

# Covered Bridges

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## PROLOGUE: BOB COVER'S TIME AND PLACE

Very grateful as I am to have been invited to New Haven to reconsider *Nomos and Narrative*<sup>1</sup> after twenty years, I am again struck by Bob Cover's stunning intellectual vigor and originality, his broad curiosity, and his irrepressible sense of humor. I particularly want to underscore his example of an enduring commitment to context, to striving for more justice in the here and now. Most significantly, I believe it worth reconsidering the very bridges that Cover identified between *nomos* and narrative. He offered only cryptic distinctions (yet distinctions with a difference) to separate but also to connect "is" and "ought"; the violent law of the state and the new norms of committed groups that challenge state law; rules and stories.

Cover had an intimate view of the power and the limitations of law. He literally and painfully put his body on the line as an activist for civil rights

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First, it was wonderful to be back at an anarchic institution to which I owe a great deal, and particularly to be there with many good friends and members of Bob's family and circle of friends. The rotating "shabbas group" Marlene and I shared in New Haven in the 1970s with Bob and Diane and Avi and Leah, Steve and Rachel Wizner and Jake and Ben, Mike Churgin, the Lessers, and the Shapiros was and still remains a great and instructive source of delight and of meaningful, hilarious camaraderie.

Next, it was a source of personal joy and pride to have my son, Raphael Moshe Booth Soifer, in the room despite the looming deadline he faced for his senior thesis in anthropology.

Additionally, April 25th yielded two decisions central to Bob Cover's work: the Supreme Court handed down both *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and *United States v. Carolene Products*, 304 U.S. 144 (1938) on April 25, 1938.

Finally, April 25th also was my late father's birthday. Samuel Soifer knew a great deal about the matters discussed in this essay and much more. But he is missed for a myriad of additional reasons. I dedicate this essay to his blessed memory.

1. Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*].

and as an opponent of the Vietnam War. His great book, *Justice Accused*,<sup>2</sup> confronted judicial complicity and illuminated profound failures of the legal imagination. Most of Cover's work, in fact, revolved around the sources that create, but might also confine law. He insistently probed whether and when moral judgment can scrutinize law from beyond law's own borders.

Unquestionably a greatly learned and creative—and often greatly abstract—thinker, Cover insisted on moving his office into the Legal Services Organization (LSO) at the Yale Law School. He wanted to be with his friends who ran the clinic and he loved the buzz of everyday lawyering for justice.<sup>3</sup> In addition, Cover sought to bridge the traditional gap between academic and clinical realms. In LSO, he was able to help students with cases as they did legal work for some of society's most vulnerable people. Further, Cover loved to talk all the way through deep ethical challenges, past and present. There hardly could be a better place than a legal clinic to confront such matters on a daily basis—and to do so in the company of smart, committed lawyers and law students making decisions in the context of real life limitations and possibilities.

Bob Cover actively bridged many worlds. With great sweetness, *chutzpah*, and insight, he elaborated noteworthy new connections. Many of his bridges were anchored in a life keenly examined and well lived. Others intertwined his sense of tragic history, belief in community vitality, and deep faith in the possibility of a better future. Nobody else had put these elements together as Cover did. He ebulliently combined them as he talked about, wrote of, and bore witness to acts of commitment through law.

Nonetheless, there are bridges—and then there are bridges—even for Bob Cover. To push a little against the connectives of the bridges that Cover constructed, without destroying such appealing, iconic landmarks, is to illuminate a significantly problematic yet enticing aspect of Cover's central metaphor. Bob Cover's bridges are anchored in time, connecting the past and future much more than they resemble traditional spans across space. Yet, paradoxically, if a communal bridge to the future depends on its being tied to the past, Cover's optimism about law seems greater and more radical than history gives us reason to expect.

With the benefit of hindsight, as well as with the immeasurably deep sadness of not having Cover with us to argue and to spark further thinking, we can discern three basic paradoxes within *Nomos and Narrative* that cry out for careful scrutiny and further thought. They center on the

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2. ROBERT M. COVER, *JUSTICE ACCUSED* (1975).

3. For the best of several accounts detailing Cover's active engagement in social justice causes, see Joseph Lukinsky & Robert Abramson, *Robert Cover: A Jewish Life*, 45 CONSERVATIVE JUDAISM 4, 5 (1993); Stephen Wizner, *Tribute to Robert M. Cover*, 96 YALE L.J. 1707 (1987).

relationships among and between: (1) bridges; (2) communities and history; and (3) redemptive obligations. Bob left all three concepts quite abstract and cryptic, as well as subtly intertwined.

By first considering each of these strands separately, and then by briefly viewing them in combination, I hope to disclose new levels in Cover's multilayered and often enigmatic discussion. With awareness of considerable tragedy throughout the world since *Nomos and Narrative*—often perpetrated by groups committed to defying legal norms—I suggest at least a few ways in which his analysis now seems additionally problematic. Cover's reliance on shared history to help define a group is troublesome. So is his stress on sacred narratives as a source of (and possible constraint upon) the obligations of group members. Nonetheless, I conclude by underscoring the profound acuity of *Covered Bridges* old and new.

### I. BRIDGES

For Bob Cover, bridges constituted a central, enticing metaphor.<sup>4</sup> It remains unclear, however, what kinds of bridges he meant to evoke. In *Nomos and Narrative*, for example, Cover wrote, "Law may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."<sup>5</sup>

Cover stoutly insisted on the human element in the creation and maintenance of law, arguing for a relatively close human link between *is* and *ought*, if the power of the state is to be denoted *law*. He wrote, for example, "If law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation."<sup>6</sup> In the section of his article entitled "Commitment," Cover maintained that *nomos* is "but the process of human action stretched between vision and reality."<sup>7</sup> Yet near the article's conclusion, he proclaimed: "The worlds of law we create are all, in part, redemptive."<sup>8</sup>

For Cover, therefore, law can be legitimate and can survive only if it

4. Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 876-893 (1993) (discussing competing redemptive interpretations of law-as-bridge with great learning and lucidity); Richard K. Sherwin, *Law, Violence and Illiberal Belief*, 78 GEO. L.J. 1785, 1813-15 (1990) (expressing fear that Cover's bridges might lead to messianic totalitarianism); Ronald R. Garet, *Meaning and Ending*, 96 YALE L.J. 1801, 1801-1816, 1820 (1987) (critically discussing Cover's bridge metaphor).

5. Cover, *Nomos and Narrative*, *supra* note 1, at 9.

6. *Id.* at 39.

7. *Id.* at 44.

8. *Id.* at 60.

continuously strives to move towards what should be. That movement might be backward or forward in time, but movement there must be. By the time he wrote *Folktales of Justice*, Cover had boiled down his central definition of law to the statement: "Law is the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there."<sup>9</sup> Cover's stripped-down definition of law requires committed effort by a group of people who intentionally seek change.

#### A. What Kind of Bridge?

Bob Cover insisted in various ways, and often with cryptic and esoteric phrases and references, that law is our own human creation. Law also entails change and must somehow connect a human *is* with a human *ought*. If faith is not a reliable source of the "ought," what kind of bridge should we envision when we try to connect our world to what might be?

Law as *is* evokes neither a cantilevered bridge, engineered to be evenly balanced, nor a detached, floating pontoon bridge.<sup>10</sup> By now, neither formalism nor Platonism ought to hold sway as we think about law, particularly in pursuit of committed social behavior. Our admiration, even sense of awe, at the modern suspension bridge makes it an appealing analogy. For many of us, this great appeal may originate in recalling, at least subliminally, gripping stories about the design and construction of the Brooklyn Bridge. That great bridge's beauty and functional importance, created out of personal courage and a great deal of tragedy, has lasted and inspired for well over a century.<sup>11</sup> The fitting legal analogy continues: As in the building of law, for example, cables for suspension bridges generally are spun on the spot, the entire edifice ultimately standing due to great tension.<sup>12</sup> Also, suspension bridges are more flexible than one might first believe. The length of the huge George Washington

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9. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 181 (1985).

10. It would be entertaining to consider other types of bridges that connect and disconnect as required, such as swing bridges and draw bridges. The ancient Roman arch bridge design, still in general use, has advantages beyond its aesthetic appeal. It requires fewer piers than alternative bridge designs, for example. It also suggests wonderful analogies because a temporary "falseworks" is often used in the building process. This is reminiscent of the legal fictions that permeate law. See Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986). And the "cutworks" that extend beyond piers under many types of bridges, built to guide the flow of water smoothly past the pier without directly assaulting it, evoke the imagined "hedge around the Torah." This concept is used to justify imposing rules that extend beyond what the Torah strictly requires to assure that the Torah's strict rules are themselves never threatened. Yet Rabbi Abraham Joshua Heschel powerfully critiqued the tendency to emphasize the hedge but ignore the Torah. ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN* 302 (1995).

11. BROOKLYN BRIDGE (Direct Cinema Ltd. 1982) (Part I of the film deals with the construction; Part II discusses the bridge as a symbol of the strength, vitality, ingenuity and promise in American culture).

12. CREIGHTON PEET, *THE FIRST BOOK OF BRIDGES* 39 (rev. ed., 1966).

Bridge, for example, varies by an average of 2½ feet in a typical year.<sup>13</sup> As Cover claimed, “A *nomos* is a present world constituted by a system of tension between reality and vision.”<sup>14</sup> Further, there is no question that for Cover *nomos* and narrative are intertwined and that they exist, to put it mildly, in considerable tension and with noteworthy flexibility.

The tension bridge metaphor is not easy to parse, of course. Are rules reality, for example, or do they become real only through the actions we take and/or the stories we tell about the rules? What if our stories themselves do not follow the rules? A parallel drawn between Cover’s use of *nomos* and Judaism’s central concept of *halachah* might extend to further congruence between Cover’s use of narrative and Judaism’s *aggadah*.<sup>15</sup> To oversimplify rather grossly, *nomos/halachah* may be said to concern rules, whereas narrative/*aggadah* primarily entails the stories that illuminate (and sometimes undercut) those very rules. If clarity within either dichotomy is difficult to discern, the sustaining range of tensions they offer should be obvious.<sup>16</sup>

As with tension bridges, it seems to be the tense connections rather than the opposite shores that support the enterprise. Tension certainly is crucial to Cover’s bridges, but the willing suspension of disbelief may be as well. It could be that Yehuda Amichai, the great Israeli poet, echoed Cover’s beliefs when Amichai went so far as to define God as “the bridge between good and evil.”<sup>17</sup>

### B. Activating the Future

In *Violence and the Word*, Cover proclaimed, “Law is the projection of an imagined future upon reality.”<sup>18</sup> This helps to explain how Cover could describe himself as an anarchist who loved law. He delighted to challenge nitty-gritty rules in the process of seeking better future worlds.

Cover’s pilgrimage toward the future—and his struggle to maintain optimism about what the future could be—became a major theme but also a major difficulty throughout his work. Though predictions are hard, particularly about the future,<sup>19</sup> the nub of the problem was different. The difficulty was largely triggered by Cover’s faith in the great, redemptive

13. *Id.* at 34.

14. Cover, *Nomos and Narrative*, *supra* note 1, at 9.

15. *Halachah* is the traditional term for Jewish law. *Aggadah* is the traditional term for nonlegal interpretation of Jewish sources, though *aggadah* often has legal implications as well. Indeed, *halachah* and *aggadah* each carry complex and nuanced meanings. Both strands, and their complex intertwining, greatly influenced Cover’s work.

16. See, e.g., HESCHEL, *supra* note 10.

17. See Leon Wieseltier, *Yehuda Amichai: Posthumous Fragments*, N.Y. TIMES REV. OF BOOKS, Nov. 26, 2004, at 39.

18. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604 (1986) [hereinafter Cover, *Violence and the Word*].

19. Attributed to Yogi Berra.

legal promises of the past. He believed that overriding principles of justice could be discerned and advanced through “committed social behavior.”

The “special case” of civil disobedience is quite instructive. Cover not only described the protestors whom he admired as “jurisgenerative,” but he applauded their assertion that “‘our lives constitute the bridges between the reality of present official declarations of law and the vision of our law triumphant.’”<sup>20</sup> A fully committed claim, made with body and soul, ought to be admired even if it might never come to fruition. Jurisgenerative challengers who confront existing law are heroic when they stalwartly seek to follow the new law they create, particularly those who are willing to pay with blood or time in prison.

Echoing Franz Kafka, whose work he loved to read, discuss, and teach, Cover next turned to a contrasting case: judges. Judges, he said, “usually write their bloodier texts in the bodies of inmates of the penal colony.”<sup>21</sup> The special case of civil disobedience strips away layers of obfuscation so that “[t]he judge’s commitment is tested as he is asked what he intends to be the meaning of his law and whether his hand will be part of the bridge that links the official vision of the Constitution with the reality of people in jail.”<sup>22</sup> It is “committed action,” after all, “that distinguishes law from literature.”<sup>23</sup> At times, Cover argued, even judges ought to transcend the constraints of their official roles if creative improvisation is necessary to reach just results.<sup>24</sup>

Nonetheless, despite Cover’s concern for the future, keen awareness of the past remained critical for his view of what might link law and “committed social action.” Though he stressed a bridge between the present and the future and emphasized the necessity of keeping the two connected, Cover relied—perhaps more than he admitted—on bridges to the past. It may be that generally “life must be lived forward, but it can only be understood backward.”<sup>25</sup> To Cover, a grasp of the past almost functioned as a precondition for generating norms that could be used legitimately to challenge the law of the state.

20. Cover, *Nomos and Narrative*, *supra* note 1, at 47.

21. *Id.*

22. *Id.* at 48.

23. *Id.* at 49. Cover developed this theme, and its ironic counterpart anchored his emphasis on the nexus between violence and the law of the state. See Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986); Cover, *Violence and the Word*, *supra* note 18.

24. In JUSTICE ACCUSED, *supra* note 2, Cover explored the choices available to a judge who confronted law that the judge believed to be immoral or unjust. The alternatives Cover discussed included: applying the law, defying the law, resigning, and “cheating.” In his powerful discussion of these options, “cheating” in the sense of getting around, over, or through the problematic law through interpretation seemed to emerge often as the best possible choice. See also Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 385 (1999).

25. Søren Kierkegaard, quoted in GARRETT EPPS, TO AN UNKNOWN GOD 7 (2001).

*C. Finding Fundamentals<sup>26</sup> Without An Excess of Pomposity*

Although the effort to sort out what kind of bridge it is to which Cover directed our attention and commitment initially sounds ominously serious, a key element of Cover's success was his lack of self-importance, even after he became a famous Yale Law School professor. He was certainly self-confident and serious about big ideas, and extraordinarily learned across a very broad range. Yet Cover frequently also embraced the ludic<sup>27</sup> in life and in letters. He had an irrepressible sense of humor and he was unusually adept at making fun of himself. He also loved to share laughs about just about anything, including the remarkable good fortune that legal academics in the United States enjoy, as we are paid well to work in the shade.<sup>28</sup>

To underscore rather than to resolve the tension between *nomos* and narrative, Cover tended at times to view law as both diabolical and comic. He used humor to connect his own hard thinking about the cold, harsh realities of law with the humanity of people who find themselves pulled within the vortex of legal jurisdiction. To be sure, no one will bill *Nomos and Narrative* as a laugh riot. Yet Cover pointed to basic elements of humor as he introduced key elements of standard legal analysis: "We construct meaning in our normative world by using the irony of jurisdiction, the comedy of manners that is *malum prohibitum*, the surreal epistemology of due process."<sup>29</sup> He pointed to an essential gap between often silly-seeming accepted rules and the potentially tragic level of the clash between good and evil.<sup>30</sup> Cover claimed that people create law to fill that gap, tartly noting that "[w]hen the devil is our own creation, he becomes comic."<sup>31</sup>

Elements essential to comedy are basic to Cover's work, including an

26. The definitions of "fundament" make the word pretty funny in itself. Thus, *Webster's II New College Dictionary*, for example, defines "fundament" as "1.a. The buttocks, b. The anus 2. The natural features of a land surface unaltered by human beings. 3. A foundation. 4. An underlying theoretical basis or principle." WEBSTER'S II NEW COLLEGE DICTIONARY 453 (1995).

27. JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT OF CULTURE* (1971) (examining the ludic as an exuberant or fanciful element of play).

28. We are blessed with the opportunity to make pronouncements that seem to be given some credibility, though often our opinions clearly are the products of what Steve Wizner calls "the leisure of the theory class."

29. Cover, *Nomos and Narrative*, *supra* note 1, at 8-9 & nn.23-25. Footnote 23 cites *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for its key point that denial of jurisdiction is "an assertion of the power of jurisdiction to decide." Footnote 25 illustrates "surreal epistemology" with Grant Gilmore's famous bon mot: "In Hell there will be nothing but law, and due process will be meticulously observed." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

30. In footnote 24, Cover asserted that at least since the ancient Greeks, people have understood relativity and the contingent nature of much of what constitutes the perceptual material in any society. Thus there arose the attractive possibility of "making fun" of the heavy investment that authority structures have in specific precepts "bearing no necessary (*malum in se*) relation to the great and potentially tragic clashes of good and evil." Cover, *Nomos and Narrative*, *supra* note 1, at 8-9 n.24.

31. *Id.*

apparently irrepressible hope for happy endings, despite all the pitfalls and pratfalls along the way. As with great comedy, Cover's work also includes imagination, *chutzpah*, and an outsider's appetite for puncturing accepted truths. For Cover, law must both transcend power and contain qualities of future redemption. Such transcendence requires the temerity of creative, piercing imagination. There ought to be fun in the very process, in the attempt to make law legitimate by requiring it to serve as a bridge to a better version of what might be. But the personal reciprocities within a community—often anchored and developed through humor targeting the powerful and challenging the status quo—are prerequisites for achieving greater justice. Finally, as in comedy, timing can be absolutely crucial in law generally. In Cover's work, as we have seen, time becomes an essential component of how and where we take our law.

## II. BRIDGES IN TIME: COMMUNITIES AND HISTORY

People who understand physics explain that Albert Einstein demonstrated that the relativity of time and space cannot be disentangled. Though Bob Cover's bridges seem more earthbound than the soaring bridges engineers build to facilitate connections in our everyday lives, his bridges are also more visionary as they connect our everyday lives to a possible, as yet unsettled, but better future.

Indeed, Cover's bridges seem simply to assume and to rest upon the past. Though he was unquestionably a distinguished legal historian,<sup>32</sup> he paid scarce attention to the role of history in *Nomos and Narrative*. We never find out what actually anchors the bridge from present to future nor do we learn what arteries lead to its entrance.

On what basis can we distinguish, therefore, between a suddenly aroused vigilante group and a longstanding civil rights organization? Are groups of terrorists—of whom we sadly have become much more conscious since Cover's death—examples of "committed social action," entitled somehow to the positive "jurisgenerative" label?

But what does "committed social action" actually entail? Can there be a metric to distinguish between groups of true believers who kill arbitrarily to advance their beliefs and those whom Cover admired for their willingness to act on the belief that our lives themselves can constitute bridges between present official declarations of law and "the vision of our law triumphant."<sup>33</sup> For Cover, interpretation itself requires commitment in order to be warranted.<sup>34</sup> Such a commitment must be made through

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32. See, e.g., COVER, JUSTICE ACCUSED, *supra* note 2; Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

33. Cover, *Nomos and Narrative*, *supra* note 1, at 22.

34. *Id.* at 45-46.



membership in a group rather than merely as a subjective individual.

Yet questions remain about how to judge new norms generated by groups. A classic violence/non-violence dichotomy did not suffice for Cover. Even when he returned to Georgia, for example, where he had been jailed and badly beaten, he proclaimed himself neither a pacifist nor even an abolitionist regarding the death penalty.<sup>35</sup> In fact, Cover insisted that all communities of resistance to law, including the very ones he celebrated, must come to grips with violence as a possible technique as they determine how and when to advance or suppress their interpretations and their actual deeds. Nonetheless, he tried to distinguish the case of idealized violence. One way Cover sought to do this was through a claim that “Jurisgenesis is a process that takes place in communities that already have an identity.”<sup>36</sup> Quoting Jean Paul Sartre, he went so far as to suggest that members of such a community must be already bound by a “pledge,” or at least by “stable cultural understanding.”<sup>37</sup>

#### *A. Shared and Stable Narratives?*

In sharp contrast to the focus groups and even the juries that tend to dominate the news today, Cover focused on organic groups, held together by shared narratives that form mutual understandings. In Cover’s view, only such a cohesive community—“already self-conscious and lawful by its own lights”—can make “[t]he persistent effort to live a law other than that of the state’s officials.”<sup>38</sup>

New groups, as well as groups with new-fangled interpretations, hardly seem to qualify within the relevant set of jurisgenerative communities. This helps explain Cover’s ambivalence about *Bob Jones University v. United States*,<sup>39</sup> the recently decided United States Supreme Court decision he used as his prime example in an essay formally meant to serve as the *Foreword* to the *Harvard Law Review*’s annual Supreme Court issue. In an opinion for a unanimous Court in *Bob Jones*, Chief Justice Burger deferred to an Internal Revenue Service ruling that the racist policies of Bob Jones violated public policy and, therefore, could properly cost the university its federal tax-exempt status.

Bob Cover criticized the decision in *Bob Jones* as follows:

The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that

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35. Cover, *The Bonds of Constitutional Interpretation*, *supra* note 23, at 831.

36. Cover, *Nomos and Narrative*, *supra* note 1, at 50 n.137.

37. *Id.*

38. *Id.*

39. 461 U.S. 574 (1983).

an exercise of political authority was not unconstitutional.<sup>40</sup>

Cover's critique of the Court for being wishy-washy was, ironically, itself somewhat wishy-washy. He acknowledged that "[t]he Amish, Mennonites, and all insular communities, whatever their stand on race, are right to be dissatisfied with *Bob Jones University v. United States*."<sup>41</sup> Yet he also complained that the Court, by relying primarily on legal technicalities, failed to provide "a constitutional commitment to avoiding public subsidization of racism."<sup>42</sup>

Cover could not bring himself to say that the Court had reached the wrong result. Rather, he argued that insular communities and the minority racial community<sup>43</sup> both deserved more than "the impoverished commitment" he perceived in Burger's opinion.<sup>44</sup> Cover strongly sympathized with both groups. But his willingness to embrace Bob Jones's position suffered because the University repeatedly changed the content of its claimed religious commitment as it squirmed to save its tax exemption. Indeed, Cover archly pointed out: "That commitment was sufficient to support the violence of racial exclusion only as long as the price of such violence was not hostile treatment by the IRS."<sup>45</sup>

Cover knew, of course, that religious norms and commitments change over time. Faced by the competing norms of the state, even insular religious communities accommodate and reinterpret their norms, sometimes finding that they must capitulate.<sup>46</sup> Nonetheless, Cover suggested, to be among "those who would make a *nomos* other than that of the state,"<sup>47</sup> a group needed awareness of its past. In Bob Cover's world, in fact, a "self-conscious and lawful" community required a strong historical sense.<sup>48</sup>

### *B. Communal Sense of the Past*

For many groups this poses no problem whatsoever. The Hawaiian image of approaching the future, for example, involves walking backward. In the Hawaiian language, the past is called "the time in front and before," whereas the future is referred to as "the time which comes behind or after."<sup>49</sup> In the Jewish tradition, from which Bob Cover emerged and in

40. Cover, *Nomos and Narrative*, *supra* note 1, at 66.

41. *Id.*

42. *Id.* at 67.

43. It is revealing that Bob emphasized pluralism among insular communities, but seemed willing to regard racial minorities as a unified bloc.

44. Cover, *Nomos and Narrative*, *supra* note 1, at 67.

45. *Id.* at 51.

46. *Id.* at 52-53.

47. *Id.* at 53.

48. *Id.* at 50 n.137.

49. JONATHAN K. OSORIO, DISMEMBERING LĀ HUI: A HISTORY OF THE HAWAIIAN NATION TO

which he remained immersed, the hold of the past is notorious. In fact, the founder of the Reconstructionist movement, Rabbi Mordechai Kaplan, seemed a great rebel when he proclaimed, "The past has a vote, but it does not have a veto."<sup>50</sup>

A key problem in deriving a group's jurisgenerative claim from history is that this metric hardly distinguishes the groups whom Cover greatly admired, such as the Mennonites, from other groups who seek to generate norms through "[o]utright defiance, guerrilla warfare, and terrorism."<sup>51</sup> Terrorists of all kinds of stripes, as well as religious fanatics in almost limitless varieties, can and do make claims of vindicating history through their beliefs and their actions. In fact, Cover sought "a radical relativization" of "law" to show that the use of violence by groups is problematic "in much the same way whether it is being carried out by order of a federal district judge, a mafioso, or a corporate vice-president."<sup>52</sup> But he did not adequately explain how to distinguish between outright murderous terrorism and radically relativized law. Nor did he explain how to distinguish between violence for its own sake and violence sheathed in law, correctly fitting the ideal of committed social action.

Sadly, Bob Cover did not get the years he needed to explore this deep problem he posed. When he gave the John E. Sullivan Lecture at Capital University Law School in late 1984, however, he had begun to focus on what he termed "sacred narratives" as the core of communal identity. Thus, he noted, "each community builds its bridges with the materials of sacred narrative that take as their subject much more than what is commonly conceived as 'legal.'"<sup>53</sup> Further, he proclaimed, "The commitments that are the material of our bridges to the future are learned and expressed through sacred stories."<sup>54</sup>

### C. The Myth/History Conundrum and Further Complications

Through his consideration of sacred canonical narratives and their

1887 (2002) (discussing the Native Hawaiian tradition that describes walking backward to enter the future); Jon Goldberg-Hiller, *A Time for Rights: Temporality and the Politics of Indigeneity in Hawai'i* (examining political terrain of the rhetorical emphasis on "now" time) (draft on file with author). *But see The Floo Floo Bird*, N.Y. TIMES, Apr. 5, 2004, at A21 (quoting architect Frank Lloyd Wright warning that the floo floo bird "always flew backward . . . because it didn't give a darn where it was going, but just had to see where it had been.").

50. This was a favorite saying of Rabbi Mordechai Kaplan, the founder of the Reconstruction movement in Judaism, conveyed to the author by Rabbi Morris Goldfarb, a student of Rabbi Kaplan's.

51. Cover, *Nomos and Narrative*, *supra* note 1, at 52.

52. Cover, *Folktales of Justice*, *supra* note 9, at 182. Cover emphasized that he certainly was not saying that all violence is equally justified or unjustified. Rather, he asserted, it is important to try to sort out when it is and when it is not justified, and good analysis will be able to distinguish dissimilar cases.

53. *Id.* at 182.

54. *Id.*

historical countertexts, Cover brilliantly explored "what the respective places of myth and history are in building law."<sup>55</sup> He celebrated history as the welcome source of the "cold water" of critical thought. Yet, he also claimed, "the complex and circuitous paths of history ought not be permitted to obscure the proper destination of our journey."<sup>56</sup> It is important to understand, he argued, "[i]t is the canonical myths that supply *purpose* for history. They are the stories we would write and would live if we could."<sup>57</sup>

A major problem lurks within the very term "sacred narratives." Though it is clear that Cover did not mean to confine "sacred" to matters generally regarded as religious, he did not provide criteria to distinguish the sacred narrative from the profane. His *Folktales of Justice*, for example, carefully considered one of the "high moments" in the "special, sacred history of the common law"—Chief Justice Coke's account of how he himself, in the name of the rule of law, bravely stood up to King James.<sup>58</sup> Actually, Cover emphasized the tension between such canonical texts that celebrate courage and the far less glorious, and often downright contradictory, accounts found in "real" history. But he never resolved what counts as a sacred or even a canonical narrative.

There is another abiding difficulty, however. It is not clear that the mafioso and the corporate vice-president lack sacred narratives or canonical myths as they go about perpetrating violence. Within both organized crime and meta-national corporations, is it not likely that myths and stories are used and passed down to justify otherwise indefensible acts? And what of all the bloodshed we have seen that is even more directly carried out in the name of the sacred narratives of religion? As the character played by Jean Renoir put it in *The Rules of the Game*, "The tragedy in life is that everyone has his reasons."<sup>59</sup>

This difficulty did lead Cover to impressive insights about jurisdiction and the Nuremburg War Crimes Tribunal, for example, as he compared the legal/mythic creation we call jurisdiction to the 1967 citizens' tribunal led by Bertrand Russell and Jean Paul Sartre concerning the Vietnam War. It also helped deepen Cover's ongoing study of the dispute in 1538 between the rabbis of Safed and those in Jerusalem, over whether Safed could or should reinstate the ancient rabbinic line—and thereby perhaps

55. *Id.* at 189.

56. *Id.*

57. *Id.*

58. *Id.* at 187-89. Cover beautifully developed parallels between Coke's posthumous account of his own courage and accounts of similar judge/king confrontations in *Mishnah Sanhedrin II* of the Talmud and in FLAVIUS JOSEPHUS, *JEWISH ANTIQUITIES*, Book XIV (R. Marcus trans., 1976). *Id.* at 183-86.

59. *THE RULES OF THE GAME* (John McGrath & Maureen Teitelbaum trans., 1970) (containing the script of the 1939 film by the same name).

hasten the coming of the Messiah.<sup>60</sup>

If nothing else, in the two decades since publication of *Nomos and Narrative* we have learned terribly much more about the tragic potential of we/they dichotomies within the sacred narratives of those committed to genocide, ethnic cleansing, and terrorism. Tragically, much that is canonical and effective in “inspiring” these and other abominations seems to be anchored and deeply rooted in the past.

Bob Cover obviously had an entirely different focus as he proclaimed, “Myth is the part of reality we create and choose to remember in order to reenact.”<sup>61</sup> And he was acutely aware of the dangers in zealous eschatology. As he eloquently cautioned: “History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would become; only history can tell us how hard it will really be to become that.”<sup>62</sup>

### III. REDEMPITIVE OBLIGATIONS

Cover’s world rested on obligations rather than on rights. Only by fulfilling an abiding obligation to seek a more just world is redemptive constitutionalism possible. Narratives of redemption, according to Cover, can shape (and possibly confine) the future. Yet the very concept of redemption suggests a past: something must be lost or surrendered to be redeemed. The past is full of obligations and promises. Actually to become what we would like to be, we must recognize the present and future hold the past has on our lives. Even as Cover strongly urged, at the conclusion to *Nomos and Narrative*, that “we ought to invite new worlds,”<sup>63</sup> he anchored his entire discussion in past myths and history.

It will surprise no one who knew Cover, or who has read his work, that he relied extensively on Jewish sources. In fact, he is frequently credited as the first “crossover” artist, unabashedly interweaving Jewish law sources with sophisticated exploration of the “mainstream” law of the United States. Not much that Bob Cover wrote and taught was mainstream, of course, and his remarkable breadth and temerity in intermingling ideas and references surely set him apart.

By now, we have had cogent critiques of some of Cover’s specific uses of Jewish law.<sup>64</sup> Yet, few would argue with his emphasis on *obligation* as

60. Cover, *Folktales of Justice*, *supra* note 9, at 191-97. See also Aviam Soifer, *Preface to NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER*, at vii, x, xii (Martha Minow et al. eds., 1992). See generally Robert Cover, *Bringing the Messiah Through Law: A Case Study*, NOMOS XXX: RELIGION, MORALITY, AND THE LAW (R. Pennock & J. Chapman eds., 1988).

61. Cover, *Folktales of Justice*, *supra* note 9, at 190.

62. *Id.*

63. Cover, *Nomos and Narrative*, *supra* note 1, at 68.

64. See Stone, *supra* note 4. See also Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, 1998 UTAH L. REV. 465; Nomi M. Stolzenberg, *Uncovering the*

the core concept in traditional Jewish thought.<sup>65</sup> Cover used his rich Jewish learning for leverage as he challenged the dominant Western, rights-oriented system, along with its narrow jurisdictional assumptions. Summarizing the difference between much Jewish thinking and mainstream American constitutionalism, Cover explained, "In a jurisprudence of *mitzvot* [commandments or good deeds], the loaded, evocative edge is at the assignment of responsibility."<sup>66</sup>

Certainly this point about responsibility or obligation is broad and vital in the context of Jewish religion and Jewish law. To a believer, moreover, it is likely to be inextricably linked to messianic faith in redemption as well. Significantly, Cover was able to step outside messianic faith, while still exploring and emphasizing redemptive possibilities for everyone in this life, rather than in any next one that there conceivably might be.

In this Part, I turn first to a bit of Talmud that, although Cover may never have encountered it, is nonetheless so relevantly Coveresque as to demand our attention. Though it underscores the dilemmas entailed in drawing implications from canonical narratives, it also suggests how richly varied—one might even say inconsistent—those narratives tend to be. This talmudic tale is also unusually rich in its suggestive implications about the importance of proper timing. Moving beyond the religious canon, I highlight instructive overlaps between Cover's central concerns and some of the themes beautifully developed by the great secular Yiddish writer, I.L. Peretz. In conclusion, I touch briefly upon the theme of redemptive constitutionalism.

#### A. Rabbi Yehudah Ha'Nasi meets Elijah the Prophet

We learn in the Talmud that Elijah the Prophet frequently appeared in the academy of the great Rabbi Yehudah Ha'Nasi.<sup>67</sup> On one occasion, Elijah was tardy. When Yehudah HaNasi had the *chutzpah* to ask Elijah why he was late, Elijah explained that he had had to wait until after he "had awakened the Patriarch Abraham and washed his hands." Elijah continued, "Then he [Abraham] began to pray and only after he had finished his prayers was I able to lay him down to sleep." He explained

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*Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809 (1994).

65. See Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

66. *Id.* at 72.

67. 5 THE TALMUD: THE STEINSALTZ EDITION, TRACTATE BAVA METZIA PART V 144-46 (Bava Metzia 85B) (A. Steinsaltz ed., 2000). Yehudah Ha'Nasi (Yehudah the Prince) is not just any old rabbi; rather, he is celebrated as the redactor of the entire Mishnah. And Elijah the Prophet is not just any prophet; rather, he is said to be the key intermediary between people living on earth and God, as well as the one who will lead the Messiah when the Messiah finally arrives. For a fine sample of the rich array of legends about Elijah, see 4 LOUIS GINSBERG, THE LEGENDS OF THE JEWS 195-235 (1913).

further that Isaac and Jacob then followed the same scenario.

Yehudah HaNasi had the audacity to suggest to Elijah that he awaken the three patriarchs together and let them pray simultaneously. But Elijah explained that if that were to happen, "they might pray so fervently that they would cause the Messiah to come before his appointed time." With still more *chutzpah*, Yehudah HaNasi then asked Elijah if there might happen to be "any people like them living now in this world who are capable of bringing the Messiah through the power of their prayer." Amazingly, Elijah confided that there were. He identified "Rabbi Hiyya and his sons, whose prayers are certain to be answered." Yehudah HaNasi, not wasting time, proclaimed a fast and arranged for Rabbi Hiyya and his sons to lead prayers before the congregated assembly. When Rabbi Hiyya uttered the words acknowledging that God causes the wind to blow, a wind blew. Rabbi Hiyya next proclaimed that God causes the rain to fall, and rain followed immediately. Within this standard daily prayer, the next declaration is, "He resurrects the dead." The Talmud advises that at this point, "the world trembled in anticipation."

It was not to be. Instead we learn, "It was then asked in Heaven: Who revealed the secret of the power of Rabbi Hiyya's prayer to the world?" Elijah, fingered as the culprit, was struck with sixty lashes of fire for revealing the secrets of heaven to man.<sup>68</sup> Before Rabbi Hiyya and his sons could reach the crucial passage, Elijah returned to earth as a fiery bear, entered the congregation, and scared the people away.

If theology is "faith seeking insight,"<sup>69</sup> this intriguing, bizarre Talmudic tale calls for a peculiar kind of faith. Even if we seek understanding faithfully, this portion of the Talmud seems to entail an ongoing, never-to-be-satisfied challenge to faith. We cannot begin to understand what the patriarchs pray for regularly, for example, or why Elijah, who often serves as an indispensable intermediary between heaven and earth, is portrayed here as an informant who, in turn, deserves to be informed against and punished in the heavenly court. A fiery bear is weird enough. But Elijah only illuminated human understanding of the power of faith. Yet this, we apparently are to believe, can be a Very Bad Idea.<sup>70</sup>

This paradoxical story encircles and circles back upon itself. If nothing

68. There is a fascinating, moving echo of this punishment in the legend about sixty bands of fire imposed on the angel Lahash, after Lahash tried to get entreaties from the people seeking mercy for Moses to God. See 3 LOUIS GINSBERG, *THE LEGENDS OF THE JEWS* 434 (1913).

69. St. Anselm of Canterbury (1033-1109) defended a notion of the relation between philosophy and theology that, like Augustine's, emphasized the methodological priority of faith over reason, since truth is to be achieved only through "fides quarens intellectum" ("faith seeking insight"). 1 *THE ENCYCLOPEDIA OF RELIGION* 305 (Mircea Eliade ed., 1987).

70. Strikingly, it is within the context of two effective threats to hasten the coming of the Messiah through prayers (offered first by ancient patriarchs floating somewhere, and then by a particularly holy earthbound rabbi and his sons) that we seem to learn that even God's timetable may be changed—albeit apparently improperly.

else, it seems to suggest the limits of prayer. It may be more subversive than that (which may help explain why this talmudic portion is not part of the canon studied in most religious *yeshivot* [schools]). Yet the tale of Yehudah HaNasi and Elijah resonates directly with Bob Cover's central concerns with obligation and the active quest for redemption, premised on the type of rare courage required to risk a great deal in the effort to achieve new and better worlds. Tradition may inform, but it must not confine. As Cover would have it, the quest involves committed action more than it requires faith. It may be that efforts toward redemption, and not redemption itself, ought to animate our lives.

### B. I.L. Peretz: *Betwixt and Between*

I am not the first, of course, to read Bob Cover in relation to the Talmud; several people have produced impressive scholarship comparing and contrasting his work with traditional Jewish religious texts.<sup>71</sup> But it may be illuminating to consider Cover's kinship with other foundational Jewish sources as well.

The great writer I.L. Peretz is aptly described as "the most influential Yiddish writer of all time."<sup>72</sup> His influence—now, tragically, largely lost—is documented in accounts of life in the Jewish ghettos at the time of the Holocaust.<sup>73</sup> Though it is not clear that Bob Cover read much of Peretz's work, there is striking congruence in their approaches to the sharp-edged richness of tradition and to the pitfalls and possibilities of change. Both were astute commentators on the inescapable heft of the past. Both knew enough not to try to turn back. The past could not be retrieved, nor was it glorious. To understand the past, in fact, obliged one to attempt to transcend what had come before without escaping from it. Neither Peretz nor Cover seemed to find solace in faith. Yet each of them empathized viscerally with the faithful as well as with the skeptical, with the leaders of the community as well as with its downtrodden.

Ruth Wisse, Peretz's biographer in English and one of the world's

71. See, e.g., Garet, *supra* note 4; Daniel J.H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309; Levine, *supra* note 64; Stone, *supra* note 4.

72. RUTH R. WISSE, I.L. PERETZ AND THE MAKING OF MODERN JEWISH CULTURE 8 (1991).

73. Perhaps best known is a powerful fictional speech in the Warsaw ghetto described in JOHN HERSEY, *THE WALL* 546-52 (1950). In seeking a web of encouragement for the suffering Jews "that was at once exact and yet broad enough to cover all ages, all loci, and all conditions of Jewry," *id.* at 547, the speaker repeatedly invokes Peretz. Through Peretz, he begins to express "that peculiar sadness-in-joy, that sense of order-in-disorder, that striving for balance, that loneliness, that wittiness and that bitterness, that subtlety and that broadness, that yearning and those dreams, which are such a large part of our faith and our way." *Id.* at 548.

Ruth Wisse reports that in the Warsaw Ghetto alone during World War II, "there were at least sixty commemorative gatherings in [Peretz's] name." WISSE, *supra* note 72, at xvi. And Peretz was discussed in the Vilna Ghetto to consider "whether literature can become the vehicle for the messianic idea" and because he had "created his works 'under the aegis of eternity.'" *Id.* (quoting, respectively, Zelig Kalmanovitch and Stanislaw Klimowski).



leading scholars of Yiddish literature and culture, explained that Peretz “tried to chart for his fellow Jews a ‘road’ that would lead them away from religion toward a secular Jewish existence without falling into the swamp of assimilation.”<sup>74</sup> If Peretz’s writing sought to “transpose the Jewish passion for holiness into a secular context,”<sup>75</sup> Bob Cover was up to much the same thing, despite his erudite references and his very different focus. To be sure, it is both high praise and considerable *chutzpah* to link Bob Cover with I.L. Peretz. Both writers frequently placed human failings in moral equipoise while simultaneously remaining enigmatic and empathetic. And both seemed greatly intrigued by, and yet often ironic about, the strong and yet dangerous pull of messianic hopes. Finally, Peretz and Cover ultimately demanded great human acts of justice and mercy in the here and now. They simply would not rely on divine intervention. Rather they actively sought to coax communal norms in the direction of more universal righteous conduct.

Peretz often was powerfully critical of the strong hold that religious norms place on ordinary, fallible human beings.<sup>76</sup> Yet he hardly can be called anti-religious. Indeed several of his best tales convey great sympathy for elements of the Orthodox Jewish life he vividly captures. And many stories succinctly capture Peretz’s own bittersweet core dualism.<sup>77</sup> Peretz’s vivid Hasidic tales often capture an acute sense of the limits intertwined with the possibilities of religious life. For example, one story tells of a Hasidic leader, the Nemirover *rebbe*, who simply disappears during some of the most significant prayers of the annual cycle.<sup>78</sup> His followers speculate that he may be ascending to heaven. But a scoffing Litvak arrives—he is an archetypal opponent of Hasidism—and

74. WISSE, *supra* note 72, at xi.

75. *Id.* at 40.

76. His poignant story, *Shtrayml*, in *SELECTED WORKS OF I.L. PERETZ* 160 (Marvin Zuckerman & Marion Herbst eds. & trans., 1996) [hereinafter *SELECTED WORKS*] is my favorite example among many. In this brief tale, a poor tailor boasts of the great power that he can unleash when he makes “a new idol,” a *shtraimel*—the fur-lined hat worn by Hasidic men who are demandingly Orthodox in their practice. Such power, says this powerful creator who is otherwise stuck within a “stupid potato-eating life,” led directly to the celebration of one twin sister’s pregnancy. But it doomed her twin, who became pregnant “somewhere in a murmuring forest on the fresh grass, amid flowers in full sap, under God’s own dark blue sky, strewn with God’s own little stars—but—without a *shtraimel*.” *Id.* at 166, 170 (emphasis added).

Though I was often surrounded by Yiddish and became aware, from an early age, that I.L. Peretz was someone special, whose stories could inspire much laughter and some tears when read aloud, I regretfully know little Yiddish and must rely on the translation and somewhat awkward spellings provided by Marvin Zuckerman and Marion Herbst in my discussion of Peretz.

77. In the beautiful miniature, *But You’ve Got To Pray, No?*, a tailor joyfully welcomes home his son, the doctor. But the young doctor will not observe any of the Sabbath ritual with his father. The doctor argues that an all-knowing God does not need to be told what a poor man needs and that a wise God hardly needs or will be pleased by praise. The father listens, thinks deeply, and says finally, “True. Everything you say, my Son, is right, but tell me—you’ve got to pray, no?” I.L. Peretz, *But You’ve Got To Pray, No?*, in *SELECTED WORKS*, *supra* note 76, at 214, 215.

78. I.M. Peretz, *And Maybe Even Higher*, in *SELECTED WORKS*, *supra* note 76, at 244.

hides under the *rebbe's* bed all night so that he can follow the *rebbe* the next morning. The Litvak discovers that the *rebbe* heads for the woods, chops down a tree and cuts it into firewood, and—using a pretense—delivers the wood to a poor sick peasant woman for whom he starts a fire. Only then does the *rebbe* recite the penitential prayers. The Litvak quickly becomes a Nemirover *hasid* himself. When the other *hasidim* speculate that their *rebbe* flies up to heaven, the Litvak quietly adds, “And maybe even higher.”<sup>79</sup>

Ruth Wisse explains that Peretz had a modern temperament that produced perpetual internal struggle while he groped toward a politics of culture.<sup>80</sup> As she puts it: “In essence, however, by turning from the dimension of space to the dimension of time, Peretz was also turning inward, away from worldly conflict to what had once been the struggle of the Jews with their God and was now increasingly the struggle of the individual Jew with his conscience.”<sup>81</sup>

This disbarred lawyer's stories often explored the quest for justice outside or beyond the established structures of the religious or secular law.<sup>82</sup> Peretz also repeatedly emphasized communal responsibility along with the richness of communal life. In a famous speech in celebration of Yiddish at the 1908 Czernowitz Language Conference, for example, Peretz directly linked this language he loved to the Hasidism, to the lives and demands of women and of workers, and to the identity of the folk, whose struggle he believed would supercede the nation-state and perhaps even transcend the violence of the law.<sup>83</sup>

If Peretz could assume that “the personality, the soul of the people is determined by tradition,” he nonetheless argued that “cultural cross-breeding is the only way to the development of a common humanity,” and that, therefore, “We must get out of the ghetto and see the world—but

79. *Id.* at 247.

80. WISSE, *supra* note 72, at 16, 66, 91.

81. *Id.* at 66.

82. Marvin S. Zuckerman, *Biographical Sketch*, in *SELECTED WORKS*, *supra* note 76, at 17, 31. The reasons for Peretz's disbarment are obscure. It seems clear, however, that there was little due process in Russia in 1888, and that anti-Semitism or internecine strife within the Jewish community—or perhaps both—may have played a part in the abrupt end to Peretz's ten-year legal career. *Id.* at 31. Bob Cover also had issues regarding Bar membership. He passed the New York Bar Examination, but unsuccessfully launched a First Amendment challenge against the questions asked and oath required prior to admission. Years later the oath requirements were changed, and Cover finally took the oath only two days before he died. Telephone conversation with Diane Cover (Apr. 12, 2005).

83. I.L. PERETZ, *Speech at the 1908 Czernowitz Language Conference*, in *SELECTED WORKS*, *supra* note 76, at 384. As a young man, Peretz wrote to Sholem-Aleykhem, an older and at the time more famous Yiddish writer, urging that Sholem-Aleykhem's new Yiddish publication address women readers with articles about Jewish history because “if each one will know what has happened to his brothers in all generations, then the consciousness [of belonging and fellow feeling] will become multiplied according to the number of generations.” I.L. PERETZ, Letter from I.L. Peretz to Sholem-Aleykhem (Letter #76) (1888), in *SELECTED WORKS*, *supra* note 76, at 370, 372. For Peretz, “every human society consists of a community of individuals, of autonomous instances, who unite because of a common need, who are united by one idea, etc.” *Id.*

with Jewish eyes.”<sup>84</sup> As Ruth Wisse sums up Peretz’s struggle, “Responsibility to the Jews, disillusionment with the bland limits of enlightenment, and mourning for the lost messianic faith are recurring themes for Peretz, who inspired his modern congregation less by quelling than by voicing their doubt.”<sup>85</sup> Bob Cover similarly could rely on neither faith nor the enlightenment. He, too, voiced doubt more than he quelled it, but he never abandoned a sense of responsibility that had to stretch beyond his own people to a more universal obligation.

### C. *Missing the Messiah*

Many of Peretz’s best-known and most loved stories and poems, as well as his influential play, *The Golden Chain*, deal explicitly with entering Heaven or with the coming of the Messiah.<sup>86</sup> But it is his very odd short story, *The Coming of the Messiah*,<sup>87</sup> that offers a particularly good illustration of the nexus between several of Peretz’s basic themes and similar key themes in Bob Cover’s work. For our purposes, it is also helpful that this peculiar little story features a bridge and that it directly anticipates Kafka. Throughout the tale, Peretz underscores the sad implications of human failures to connect as well as the problem of pervasive limitations upon human understanding.

The story is set in a provincial Jewish community in Galicia that boasts a madman. This lunatic fears nobody, but everyone in the town fears him. The young narrator explains that he has sympathized with the madman, but decided to keep his distance and not to get dirty. As night fell every evening, a drawbridge came up and the town was cut off from the rest of

84. I.L. PERETZ, *What Is Missing in Our Literature?*, in *SELECTED WORKS*, *supra* note 76 at 356, 358. Peretz went on to suggest a move “Back to the Bible,” but with an understanding that Jewishness must always be dynamic and that “[c]reation is the elevation of the soul.” *Id.* at 360. Thus, he proclaimed that by “Back to the Bible” he actually meant a little withdrawn from the world and looking deeply inward in search of the Jewish soul—“and from there—on onwards toward man and humanity, along the Jewish road.” *Id.* at 361.

85. WISSE, *supra* note 72, at 66. As Wisse emphasized, Peretz possessed “a modern temper that remained in perpetual quarrel with itself.” *Id.* at 91. His work therefore “highlights the contrast between the decaying religious superstructure and the earthly Jews who manifest truly modern instincts in spite of it.” *Id.* at 92.

86. Discussion of the gripping richness and fascinating implications of Peretz’s work is well beyond the scope of this essay. See, for example, the brilliant *Bontshe Shvayg*, in *SELECTED WORKS*, *supra* note 76, at 187 (probably Peretz’s best-known story about a true innocent who, after being very badly treated on earth, is welcomed into Heaven with unusual ease and great fanfare, but asks only for “a hot roll with butter” when he is told he can have anything he wishes); *The Supreme Sacrifice*, in *SELECTED WORKS*, *supra* note 76, at 291 (apparently featuring the daughter of the same wise and righteous Rabbi Hiyyah of the Babylon Yeshiva who was a key player in the Talmud portion discussed above in Part III.A; and *Monish*, in *SELECTED WORKS*, *supra* note 76, at 113 (a youthful poem that Ruth Wisse reads as “a painful parable about the makings of the modern Jew out of compounded acts of betrayal,” WISSE, *supra* note 72, at 16). Peretz’s influential play, *The Golden Chain*, in *SELECTED WORKS*, *supra* note 76, at 398, revolves around the attempt by a Hasidic rabbi to force God’s hand and to hasten the coming of the Messiah by refusing to end the Sabbath. The play’s tale of declension traces the consequences of the rabbi’s *chutzpah* across three generations that follow.

87. I.M. PERETZ, *The Coming of the Messiah*, in *SELECTED WORKS*, *supra* note 76, at 201–07.

the world until morning, with heavily armed sentries stationed at each locked gate.

One night the unnamed narrator finds himself outside the town, unable to return before the drawbridge is raised. Though he had dreamed nightly about this outside world, he is now terribly frightened and suddenly senses breathing nearby. It is the madman, looking at him "with tenderness and devotion" and he soon recalls that, in other times and places, lunatics are considered prophets.

The lunatic softly assures the young man that he believes in the coming of the messiah, and that the messiah will be recognized because he will have wings—"and afterwards all will acquire wings," starting with children born one by one with wings.<sup>88</sup> After listening to the "sweetly sad" voice of the madman all night, the young man returns to the town, but he can no longer abide all the frightened townspeople. "My heart was seized with a dreadful pang; I was overcome with yearning, and I resolved to ride out and meet the messiah."<sup>89</sup> As far as he could travel, however, he could discern only the same trembling human melancholy that he already knew.

The narrator finally enters an inn and encounters a grandfather, father, and son together in the same room, but separately engrossed in studying different books. Two women interrupt their tableau, bringing news that a third woman just gave birth. Though there is some joy because the baby is a boy and because the mother has survived, there is also great consternation because the baby has marks of wings on both shoulders.

The grandfather sternly warns, "Wings lift you into the air. With wings it is difficult to keep your feet on the ground."<sup>90</sup> His grandson defiantly argues that it is better to live in the heights. The man of the middle generation replies that there are "no enterprises to manage" in the heights, and "not even anyone from whom to buy a few rabbit pelts."<sup>91</sup> Finally, the grandfather gravely intones against the heights because they lack synagogues and study-houses. "To be sure," the grandfather warns, "one is free as a bird, but woe to the free flying bird who is overcome by doubt or foreboding!"<sup>92</sup>

Just as the youngest man starts to challenge his grandfather, his grandmother interrupts, asserting that all men are fools. She worries only about whether the rabbi will let the child be circumcised and whether he will allow a blessing for a child with wings. The weird story ends abruptly at this point, as the young narrator realizes that everything outside

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88. *Id.* at 204.

89. *Id.*

90. *Id.* at 206.

91. *Id.*

92. *Id.*

his hometown has been just a dream.

The story is too staunchly allegoric and too formulaic to be entirely successful, and it certainly lacks the bitter bite of Kafka. Nonetheless, as Peretz wrestles with the blindness of particularity and tradition, and also with the airiness of universality and abstract hope, he provokes further thought about human action and redemption.

There is deep ambivalence in Jewish tradition about whether or not human conduct can hasten the coming of the messiah. One interpretation has it that "Man's task is to make the world worthy of redemption."<sup>93</sup> The other stresses that redemption is a divine mystery whose "time" is not influenced by human actions.<sup>94</sup> Peretz's work repeatedly and cogently underscored the problematic nature of human attempts to hasten redemption, and Bob Cover never stopped wrestling with this very issue within the context of law and redemptive constitutionalism.

#### *D. Remembrance and Redemption*

Bob Cover criticized the Supreme Court's decision in *Bob Jones University* as "a play for 1983—wary and cautious actors, some eloquence, but no commitment."<sup>95</sup> He derided the Justices for "casting their cautious eyes about, ferreting out jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege."<sup>96</sup> He embraced the irony that constitutionalism emerges from recognition of state power combined with necessary distrust of that power, but claimed that judges therefore have a particular responsibility to go beyond even reaching the right result.

A key point for Cover was that constitutionalism ought to extend beyond legitimizing the state. It should legitimize communities and movements as well, aware as we all should be of the need to remain somewhat dubious of the power of social movements and of the "nomian worlds" they create. Nonetheless, redemptive constitutionalism is doubly important. It affords "a challenging enrichment of social life."<sup>97</sup> It also

93. HESCHEL, *supra* note 10, at 380.

94. These two major interpretive strands are summarized succinctly in ETZ HAYIM: TORAH AND COMMENTARY 1164 (David L. Leiber & Jules Harlow eds., 2001). Indeed, even Isaiah's famous description of the Messiah's return actually is deeply ambiguous:

The smallest shall become a clan;  
The least, a mighty nation.

I the Lord will speed it in due time (Isaiah 60:22).

*Id.* at 1163-64. There are clear and somewhat disturbing elements in this of "all deliberate speed," embraced by the United States Supreme Court as a key element in its school desegregation enforcement decision in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

95. Cover, *Nomos and Narrative*, *supra* note 1, at 67.

96. *Id.*

97. *Id.* at 68.

affords "a potential restraint on arbitrary power and violence."<sup>98</sup>

How can we tell when constitutionalism is redemptive? There is obviously no clear-cut test, no easy litmus. Yet two admittedly elusive, recurring elements appear to stand out prominently in Cover's work. These depend upon: (1) communities who are defined by their commitment to (2) remembrance and change. Both of these strands engage with past promises, and neither shies away from recognizing the chasms between promises made and promises kept. That said, the criteria involved remain dauntingly difficult to discern. They are even harder to apply.

In part, this is because the great English legal historian Frederic W. Maitland was probably right—as he so often was—when he observed, "Collectivity is the smudgiest word in the English language."<sup>99</sup> It is often devilishly difficult to ascertain who is "in" and who is "out" of a community or a movement. Indeed, the law of the state is called upon frequently to help make such determinations, though the area is fraught with traps for all concerned.<sup>100</sup>

Even if we can decide the fraught question of who counts within the relevant group, how can we navigate between ideals remembered and changes needed? This question was at the core of Peretz's concerns and it was central for Bob Cover as well. The many facets of the obligation to remember—*zahor*<sup>101</sup>—haunted both men. In fact, both wrestled constantly with the idea that those now alive are obliged to act vigorously for the future because of what has come before.<sup>102</sup>

Cover's work demanded moral responsibility of judges as well as of groups of people capable of challenging the status quo. He insightfully captured and then rejected the "Judicial Can't."<sup>103</sup> Like great poets, Cover

98. *Id.*

99. Quoted in AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 73 (1995) (discussing multiple definitions and implications of community).

100. Zechariah Chafee, Jr., *Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 990, 993 (1930). See generally CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002).

101. See generally YOSEF H. YERUSHALMI, ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY (1982). For an argument about Jewish memory that distinguishes among remembrance, history, and myth, see BERNARD LEWIS, HISTORY: REMEMBERED, RECOVERED AND INVENTED (1975).

102. The excellent commentary in a recent edition of the Hebrew Bible, for example, explains: Remembered. The Hebrew stem *zahor* connotes much more than merely the remembrance of things past. It means "to be mindful, to pay heed" and signifies a sharp focusing of attention on someone or something. It embraces concern and involvement, and always leads to action.

ETZ HAYIM, *supra* note 94, at 326. (For Proust, for example, "remembrance of things past" hardly was as narrowly limited as this statement implies, but that really is another story). At another point, the commentary in ETZ HAYIM more succinctly describes the obligation to remember: "'To remember' in the Bible is not to retain or to recall a mental image. It is to focus on the object of memory that results in action." *Id.* at 46.

103. COVER, JUSTICE ACCUSED, *supra* note 2, at 119-27. Cover suggested that a judge who faces a serious moral/formal dilemma should be more like "[a] great speaker or writer of the language [who] ordinarily acts according to the rules but knows when and how to ignore them as well." *Id.* at 127.

argued, great judges have to know the rules but they also have to know when to bend or break them. To free a slave might require manipulation by a judge properly morally outraged by slavery, but even this “cheating” was preferable to the stance of judges who protested too much about role constraints and dire consequences—and returned former slaves to slavery. For judges and for groups of activists alike, the overarching lesson is to seek the moral high road. To do so generally requires keen awareness of the past, including insistence on grand past promises not yet kept and, perhaps, never attainable.

Cover’s sense of history included a keen perception “not only of the pastness of the past, but of its presence”; he successfully managed to put “the timeless and the temporal together.”<sup>104</sup> To him, groups who seek seriously to challenge current law are best able to do so when they realize that the present has an impact on the past, just as the past has a clear effect on the present. In the Jewish tradition, all Jews for all time were redeemed from Egypt and slavery and all were present at Sinai for the giving of the Torah. This redemption clearly entails current and ongoing obligation as well.

It hardly seems coincidental that within Rev. Martin Luther King, Jr.’s soaring *I Have a Dream* speech, he insisted upon “the fierce urgency of now.”<sup>105</sup> Significantly, the trope King used to illustrate this point was mundane and backward-looking as well as wonderfully visionary. He proclaimed that hundreds of thousands of marchers had arrived in Washington that sweltering day “to cash a check.” King elaborated: “When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men—yes, black men as well as white men—would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”<sup>106</sup> In fact, King noted, instead of honoring “this sacred obligation,” the check had been returned to the Negro people marked “insufficient funds.” But, he continued, “[w]e refuse to believe that the bank of justice is bankrupt.”<sup>107</sup>

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And such action, he argued, might then change the rules.

104. MILTON KONVITZ, *TORAH AND CONSTITUTION: ESSAYS IN AMERICAN JEWISH THOUGHT* 132 (1988). Konvitz quotes, somewhat peculiarly, *Tradition and the Individual Talent*, an essay about artistic influence by T.S. Eliot—a well-known anti-Semite as well as a great poet. Konvitz extrapolated and enriched Eliot’s point and claimed, “In Judaism, then, the past is altered by the present, and the present is altered by the past.” *Id.* at 133.

105. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), *quoted in* LENWOOD G. DAVIS, *I HAVE A DREAM: THE LIFE AND TIMES OF MARTIN LUTHER KING, JR.* 261 (1969). The speech is discussed briefly in Aviam Soifer, *Redress, Progress and the Benchmark Problem*, 40 B.C. L. REV. 525 (1999).

106. King, *supra* note 105, at 331-32.

This remarkable blend of the grand yet simple promises of past ideals, the technical obligations of a legal promissory note, and the continuing responsibility to perform redemptive acts encapsulates many of the possibilities of redemptive constitutionalism. So does the insight within the civil rights movement that at times challenging legal rules becomes necessary to redeem legal promises. The "symmetries of social obligation"<sup>108</sup> demand nothing less.

A central tension within redemptive constitutionalism pits those with faith in redemption against those with faith in constitutionalism. Bob Cover never resolved this conflict. It may be irresolvable. Redemptionists tend to emphasize some specific yet sweeping end game; constitutionalists do sometimes embrace particular ends, but they tend to care most deeply about the particular means involved. Many more—and more frightening—true believers may be found among redemptionists, but constitutionalists have a disturbing tendency to remain blind about the inherent limitations of rules and the shortcomings of principled or detached neutrality.

Within our unjust world, even means that are important within the search for justice ought not to be considered ends in themselves. Throughout the Hebrew Bible, in fact, the duty to pursue justice is linked repeatedly with the duty to apply righteous judgment—and both are proclaimed to be necessary components in living a good life as well as in properly performing the judicial role.<sup>109</sup> Dreamers of great dreams such as I.L. Peretz and Bob Cover stand out in part because, in addition to being provocative visionaries, they were steeped in the past and painfully aware of its perils. Like Yehudah Ha'Nasi's effort to hasten the coming of the messiah in the Talmudic tale, they both also understood the obligation to take a position and thereby to try to improve the world. In the process, they each delighted in invoking the grand promises of the past. Yet they also understood the need to challenge those very promises, to remain skeptical even of their own impressive attempts at redemptive action.

This version of redemptive constitutionalism transcends any constitutional documents or legal precedents. It looks to the past. But it truly does invite new worlds.

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107. *Id.*

108. Charles L. Black, Jr., Brief for Petitioners at 40, *Barr v. City of Columbia*, 378 U.S. 146 (1964).

109. See, e.g., *Genesis* 18:19; *Exodus* 23:1-9; *Deuteronomy* 10:17-19. The Hebrew word *mishpat* is usually translated as either law or justice; the Hebrew word *tz'dakah* is generally either righteousness or equity. Some of the Prophets explicitly added "kindness" (*hesed*) to "law/justice" and "equity/righteousness" as a third obligatory quality for the appropriate judgments of both God and man. See, e.g., *Isaiah* 16:5; *Jeremiah* 9:23. For an initial stab at the very rich topic of biblical discussions of the judicial role extending beyond formal neutrality, see SOIFER, *LAW AND THE COMPANY WE KEEP*, *supra* note 99, at 167-75.



## IV. CONCLUSION

Bob Cover defined integrity quite cryptically as “the act of maintaining the vision that it is only that which redeems which is law.”<sup>110</sup> Law, to be law, must be redemptive. And Cover felt and shared an obligation to focus that vision, to keep justice and righteousness in mind no matter what the formal legal rules might seem to say. Head, heart, and soul combine to share an obligation to pursue justice in each and every context. Or, as Rabbi Abraham Joshua Heschel put it, “The opposite of freedom is not determinism, but hardness of heart.”<sup>111</sup> And what is needed “is not only to respect justice in the sense of abstaining from doing injustice, but also to strive for it, to pursue it.”<sup>112</sup> Like Heschel, Bob understood that “The law must not be idolized.”<sup>113</sup>

Remembrance and redemption ultimately cannot be disentangled. They demand a tightrope walk of skepticism and critical thinking, direct engagement opposing current injustice, and abiding optimism. These difficult bridges must be traversed in the active pursuit of a more just world.

We cannot know, of course, if Bob Cover actually moved any of us closer to redemption. And the arrival of the Messiah any time soon hardly seems a reliable forecast today, notwithstanding the beliefs of many among the swelling ranks of evangelical Christians.<sup>114</sup> Yet if the active pursuit of significant ideas about law and justice can ever be a bridge to redemption, no one in our time has done as much as Bob Cover in that effort. As Martha Minow pointed out, Cover’s work has seemed increasingly timely since his death. As she put it, “Whether from principled deference to the contrasting parts of himself or pragmatic survival, Cover insisted that legal scholarship connect to the largest of

110. Cover, *Folktales of Justice*, *supra* note 9, at 201.

111. ABRAHAM J. HESCHEL, *THE PROPHETS* 191 (1962).

112. *Id.* at 207.

113. HESCHEL, *GOD IN SEARCH OF MAN*, *supra* note 10, at 326. Heschel stressed that the Torah is “both a vision and a law” and that “[l]aw is what holds the world together; love is what brings the world forward. The law is the means, not the end; the way, not the goal.” *Id.* at 323. According to Heschel, the Torah itself includes both *halacha* and *agada* as interdependent strands. *Halacha* stresses uniformity and *agada* underscores the need for inflection and diversity. Heschel directly criticized those who render Torah with too much emphasis on *nomos*, and he elevated “right living.” *Id.* at 328-30. In fact, Heschel asserted, “There is a task, a law, and a way: the task is redemption, the law, to do justice, to love mercy, and the way is the secret of being *human and holy*.” *Id.* at 238.

114. We do have, however, some good recent examples of irreverent Messiah humor. One story making the rounds asks, “What happens if you cross a Yeki (an uptight German Jew) with a *Lubovitsch Hasid*?” Answer: “You get a Messiah who comes on time.”

Another involves the late philosopher Robert Nozick’s amendment of a point that Martin Buber once made. Buber said that much of the animosity between Christians and Jews could be avoided if people simply waited until the Messiah arrived and then asked, “Does the place look familiar?” Nozick offered audacious further advice to the future Messiah: “Say you don’t remember.” *Quoted in* James Carroll’s eulogy for Nozick, *The Essence of Robert Nozick To Know*, BOSTON GLOBE, Jan. 29, 2002, at A11.

spiritual and emotional meaning.”<sup>115</sup>

Joseph Lukinsky, who was Cover’s Talmud teacher and great friend, once observed, “The task of education is to use what scholars say to get back to the world which existed before they said it.”<sup>116</sup> Cover did have the integrity of a great educator, but he surpassed the past. With enthusiasm, he lived and taught toward redeeming hope.

In fact, Cover loved the pursuit of justice for itself. Yet he never forgot, as many do, that it remains important to love justice too. Cover wrestled with the past and with sacred narratives much more than most people do, and he did so with extraordinary passion and wisdom. And even if our world seems generally headed in the wrong direction, Bob Cover will be remembered as a blessing in the irrepressible quest to construct bridges to better new worlds.

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115. Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *NARRATIVE, VIOLENCE, AND THE LAW*, *supra* note 60, at 1, 11.

116. Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover’s Nomos and Narrative*, 96 *YALE L.J.* 1836, 1859 (1987).